In the Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 1093.

WALLACE G. WILBUR,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of the Case.

Petitioner, Wallace G. Wilbur, was convicted in the Plymouth Superior Court for the Commonwealth of Massachusetts under nine indictments for breaking and entering summer dwellings with intent to commit larceny and for larceny (P. App.[1] A, p. 10). At the time of his arrest he was employed by the Commonwealth as a "natural resource officer." As such he was empowered to "exercise . . . all the authority of police officers and constables, except the service of civil process." Mass. G.L. c. 21, § 6B (as amended by St. 1964, c. 524, § 2).

Petitioner was arrested on March 21, 1965, by a state police officer at an antique shop owned by petitioner (P. App. A, pp. 10-11). He was handed a validly issued arrest

[1] "P. App." refers to the Appendix to the Petition.

warrant and three validly issued search warrants authorizing a search of the antique shop (P. App. A, pp. 11-13). The arresting officer warned petitioner "of his right to counsel, and to telephone counsel or friends and that anything he might say might be used against him in court" (P. App. A, p. 16). He was also told he could use the telephone in police barracks nearby, for there was no telephone in the shop. He was not warned at this time, more than a year prior to *Miranda* v. *Arizona,* 384 U.S. 436, that, if he could not afford an attorney, one would be appointed for him. Thereafter, upon a search of the premises, the arresting officer seized stolen property described in the warrants. While on the premises of the antique shop, immediately after the arrest, petitioner made statements which could have constituted admissions. These included statements "(1) that the Witch's Brew 'was his [Wilbur's] establishment.' (2) That he had recently sold the contents and (3) that he could not recall from whom he had purchased various items found in the shop" (P. App. A, p. 15, fn. 6).

Petitioner did not testify at the trial, and the trial judge "instructed the jury that where there is possession of stolen property by a defendant soon after a theft, and the possessor 'offers no explanation as to his possession, there is a presumption that he stole it.' Such possession, . . . 'if no explanation is given or an unsatisfactory account is given, is presumptive evidence of guilt' " (P. App. A, p. 17). The judge also "charged specifically that Wilbur had a constitutional privilege not to testify and that 'the fact that Wilbur did not take the stand does not give you [the jury] the right to draw an unfavorable inference therefrom' " (P. App. A, p. 18). After petitioner's conviction he appealed to the Supreme Judicial Court of Massachusetts, which affirmed the decision of the trial court (P. App. A, p. 19).

Argument.

The decision of the Supreme Judicial Court is manifestly correct, and therefore the petition for certiorari should be denied, for the following reasons:

(1) The record affirmatively demonstrates that petitioner had funds to secure counsel and that he intelligently waived his right to remain silent and to counsel. The Massachusetts court held that "[t]here was no reasonable basis for suspecting that he was indigent and every affirmative indication that he was in a position to employ counsel if he wanted an attorney" (P. App. A, p. 16). In *Miranda* v. *Arizona,* 384 U.S. 436, 473, at footnote 43, this court stated:

> "While a warning that the indigent may have counsel appointed need not be given to the person who . . . is *known to have ample funds to secure one,* the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability *when there is any doubt at all on that score.*" (Emphasis added.)

The record affirmatively demonstrates that petitioner was gainfully employed by the Commonwealth as a natural resource officer, and he was wearing the uniform of his office at the time of his arrest. As a natural resource officer empowered with "all the authority of police officers and constables, except the service of civil process," he cannot be regarded as ignorant of his rights.

Moreover, the testimony of the arresting officer clearly indicates that petitioner was aware of his rights and chose to waive his right to remain silent and to counsel. Thus the arresting officer testified:

> "A I told him we were conducting an investigation. I said, 'You are a law enforcement officer.' I

said, 'This might sound,' words to the effect, silly. 'Me telling you.' But I said, 'But you don't have to say anything. If you do say anything it can be used against you and you have a right to a lawyer. You have a right to have a phone call and if you want to make a phone call I will take you down to the Dartmouth Barracks now.' And I asked him three times if he understood this.

"Q And what did he say?

"A He said, 'Yes.' He said, 'It's all right.'" (H. Tr.[2] 88.)

The above uncontradicted testimony was corroborated by another arresting officer (T. Tr.[3] 132). See also T. Tr. 59, 164.

The decision of the Massachusetts court in no way suggests that the *Miranda* warning should not be given simply because a defendant is known to be solvent. Indeed, the court stated: "[W]e, of course, do not suggest that police officers should not give the full *Miranda* case warning merely because they know a particular defendant to be abundantly solvent. On the contrary, we think that the only safe course for law enforcement officers is to apply the rules of the *Miranda* decision, even if in the particular case attention to some aspects of those rules may seem unnecessary as a practical matter" (P. App. A, p. 17, fn. 8). However, keeping in mind the date of the arrest here (long before *Miranda*), and the record's clear showing that the petitioner was not insolvent and that he knew his rights, the Commonwealth submits that the lack of warning regarding the rights of an indigent was not error. See *State*

[2] "H. Tr." refers to the transcript of the hearing on the motion to suppress.

[3] "T. Tr." refers to the trial transcript.

v. *Gray,* 268 N.C. 68, 80-83 (1966), cert. den. 386 U.S. 911. Petitioner does no more than try to contradict these facts.

(2) The presumption of guilt arising from the unexplained possession of recently stolen goods is constitutionally permissive consistent with the decisions of this court. Petitioner's argument that the trial judge cannot comment on a defendant's failure to explain possession of recently stolen goods is contrary to all precedent. Similar presumptions and permissible inferences have been upheld by this court in *Yee Hem* v. *United States,* 268 U.S. 178, 183-185 (possession of opium in absence of satisfactory explanation creates presumption of concealment with knowledge of unlawful importation) and *United States* v. *Gainey,* 380 U.S. 63, 65-68, 70-71 (presumption of guilt arising from unexplained presence at site of illegal still). In these cases as well as in this case there is a rational connection between the fact proved and the ultimate fact presumed. Accordingly, all judicial precedent indicates that there is no violation of the defendant's due-process rights. See *Anglin* v. *State,* 244 Md. 652, 656-663 (1966), for collection of cases. The instruction by the trial judge in this case based on clear precedent is in no way a comment on defendant's right to remain silent within the holding of *Griffin* v. *California,* 380 U.S. 609, 612-615. Indeed, the trial judge specifically further instructed the jury that Wilbur had a constitutional privilege not to testify and that "the fact that Wilbur did not take the stand does not give you [the jury] the right to draw an unfavorable inference therefrom" (P. App. A, p. 18).

As the Massachusetts Supreme Judicial Court held (P. App. A, pp. 18-19), the explanation of a defendant's possession may come from someone other than that defendant. Should it happen that a defendant has no one but himself to offer an explanation, his misfortune is due not to any un-

constitutional compulsion to testify, but to the force of circumstances. *Yee Hem* v. *United States, supra,* 185. *United States* v. *Gainey, supra,* 70-71.

In any event, the instructions of the trial judge were manifestly correct, consistent with all precedent, and in no way an improper comment on the petitioner's right to remain silent.

Conclusion.

For the foregoing reasons it is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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